

STATE OF MICHIGAN
IN THE SUPREME COURT

DEBORAH SUE NICKE,

Plaintiff-Appellant,

UNPUBLISHED

January 26, 2006

263929

rt Case

V

No. 263929

Wayne Circuit Court

LC No. 03-335375-NI

KENNETH MICHAEL MILLER,
AUTOMOTIVE RENTALS, INC., HIGH
VOLTAGE MAINTENANCE CORPORATION.,
and EMERSON ELECTRIC COMPANY,

G. Drain

Defendants-Appellees,

and

JUAN HERNANDEZ-MORENO and STATE
FARM MUTUAL AUTO INSURANCE
COMPANY,

Defendants.

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APPLICATION FOR LEAVE TO APPEAL OF DEFENDANTS/APPELLANTS
KENNETH MILLER, AUTOMOTIVE RENTALS, INC., HIGH VOLTAGE
MAINTENANCE CORPORATION AND EMERSON ELECTRIC CO.

FILED

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CLERK

MICHIGAN SUPREME COURT

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| INDEX OF EXHIBITS..... | iii |
| INDEX OF AUTHORITIES..... | iv, v |
| STATEMENT OF ORDER APPEALED FROM/RELIEF REQUESTED | vi |
| STATEMENT OF THE BASIS OF JURISDICTION | vii |
| STATEMENT OF QUESTION PRESENTED | viii |
| STATEMENT OF FACTS | 1 |
| A. <u>SUBSTANTIVE FACTS</u> | 1 |
| 1. The Accident..... | 1 |
| 2. Appellee’s Immediate Post-Accident Symptoms | 2 |
| 3. Appellee’s Preexisting Injuries | 4 |
| 4. Appellee’s Alleged Injuries And How They Affected Her Life..... | 7 |
| B. <u>MATERIAL PROCEEDINGS</u> | 9 |
| 1. The Trial Court’s Opinion | 9 |
| 2. The Court of Appeals’ Opinion | 10 |
| ARGUMENT | 12 |
| I. <u>THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY CREATING AND IMPOSING A SEPARATE AND INDEPENDENT DUTY UPON THE TRIAL COURT TO DECIDE IF APPELLEE SUSTAINED A <i>TEMPORARY</i> SERIOUS IMPAIRMENT OF BODY FUNCTION EVEN THOUGH THE TRIAL COURT REACHED ITS DECISION AFTER CONSIDERING THE “TOTALITY OF THE CIRCUMSTANCES”, WHICH INCLUDES TEMPORAL FACTORS ARTICULATED IN <i>KREINER</i></u> | 12 |

| | | |
|----|---|----|
| A. | Standard of Review | 12 |
| B. | Argument | 13 |
| 1. | <i>The Kreiner Criteria.....</i> | 13 |
| 2. | <i>Although The Court Of Appeals Agreed With The Trial Court That Appellee Did Not Sustain A Permanent Serious Impairment, The Court Of Appeals Erroneously Determined That The Trial Court Failed To Ascertain Whether Appellee Sustained A Temporary Serious Impairment.</i> | 15 |
| 3. | <i>Kreiner Does Not Impose Upon The Trial Court A Separate And Independent Duty To Determine If Appellee Sustained A Temporary Impairment Of Body Function</i> | 16 |
| 4. | <i>If The Court Of Appeals' Decision Remains Undisturbed, It Could Lead To An Erosion Of Kreiner</i> | 19 |
| | RELIEF REQUESTED..... | 22 |

INDEX OF EXHIBITS

Exhibits

| | |
|-----------|---|
| Exhibit 1 | Defendants' Motion for Summary Disposition |
| Exhibit 2 | Transcript - Defendants' Motion for Summary Disposition |
| Exhibit 3 | Court of Appeals Opinion and Order |

INDEX OF AUTHORITIES

Cases Cited

Page(s)

| | |
|---|---|
| <i>Corley v Detroit Bd of Ed,</i> 470 Mich 274, 278 (2004) | 12 |
| <i>DiFranco v Pickard,</i> 427 Mich 32, 60; 398 N.W.2d 896 (1986)..... | 13 |
| <i>Dresel v Ameribank,</i> 468 Mich 557, 561 (2003) | 12 |
| <i>Karbel v Comerica Bank,</i> 247 Mich App 90, 96-97 (2001) | 12 |
| <i>Kreiner v Fischer,</i> 470 Mich 109 (2004) | vii, viii, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 |
| <i>Miller v Purcell,</i> 246 Mich App 244, 246 (2001)..... | 12 |
| <i>Quinto v Cross & Peters Co,</i> 451 Mich 358, 362 (1996) | 12 |
| <i>West v Gen Motors Corp,</i> 469 Mich 177, 183 (2003) | 12 |

Statutes & Court Rules

| | |
|------------------------------|------------|
| MCL 500.3135 | vi, 10, 16 |
| MCL 500.3135(2)(a)(i) | 13 |
| MCL 500.3135(2)(a)(ii) | 13 |
| MCL 500.3135(7) | 13 |
| MCR 2.116(C)(10)..... | 12, 22 |
| MCR 7.301(A)(2) | vii |
| MCR 7.302(B)(3)..... | vii |

INDEX OF AUTHORITIES, CONTINUED

Statutes & Court Rules

MCR 7.302(B)(5)..... vii

MCR 7.302(2)(b) vii

STATEMENT OF ORDER APPEALED FROM AND RELIEF REQUESTED

Defendants-Appellants apply for leave to appeal the Court of Appeals' January 26, 2006 unpublished opinion and order reversing the Wayne County Circuit Court's decision granting Defendants-Appellants' motion for summary disposition as to the issue of whether Plaintiff-Appellee sustained a serious impairment of body function pursuant to MCL 500.3135 arising out of the November 29, 2000 automobile accident.

Defendants-Appellants respectfully request that this Honorable Court grant leave to appeal the Court of Appeals decision and reverse the Court of Appeals Opinion and Order thereby reinstating and affirming the trial court's decision that Plaintiff/Appellee did not sustain a serious impairment of an important body function.

STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Supreme Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2), 7.302(B)(3), (5) because Defendants-Appellants¹ are appealing a decision of the Court of the Appeals that is clearly erroneous, will cause material injustice, and conflicts with the Supreme Court decision of *Kreiner v Fischer*, 470 Mich 109 (2004).

On January 26, 2006, the Court of Appeals entered its Opinion and Order reversing and remanding the trial court's decision granting Defendants-Appellants' Motion for Summary Disposition. Defendants-Appellants seek leave to appeal the Court of Appeals' decision by filing their application within forty-two (42) days after entry of the opinion as provided in MCR 7.302(2)(b).

¹ Defendants-Appellants, Kenneth Michael Miller, Automotive Rentals, Inc., High Voltage Maintenance Corporation, and Emerson Electric Co., will hereinafter be collectively referred to as "Appellants" in this Brief.

STATEMENT OF QUESTION INVOLVED

- I. **WHETHER THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY CREATING AND IMPOSING A SEPARATE AND INDEPENDENT DUTY UPON THE TRIAL COURT TO DECIDE IF APPELLEE SUSTAINED A TEMPORARY SERIOUS IMPAIRMENT OF BODY FUNCTION EVEN THOUGH THE TRIAL COURT REACHED ITS DECISION AFTER CONSIDERING THE “TOTALITY OF THE CIRCUMSTANCES”, WHICH INCLUDES TEMPORAL FACTORS ARTICULATED IN *KREINER*.**

Plaintiff/Appellee² Answers: No.

Defendants/Appellants Answer: Yes.

Court of Appeals Answers: No.

² Plaintiff/Appellee, Deborah Sue Nicke, will hereinafter be referred to as “Appellee” in this Brief.

STATEMENT OF FACTS

Appellants incorporate the statement of facts section as it appeared in Appellants' brief on appeal to the Court of Appeals with the exception of the material proceedings summary.

A. SUBSTANTIVE FACTS

1. **The Accident.**

This case arises out of a multi-vehicle accident that occurred on November 29, 2000 at approximately 7:55 a.m. As noted in the police report, the accident occurred on westbound I-96 near Brookfield Street, which is just west of the Farmington Road overpass. See Police Traffic Crash Report attached as **Exhibit 1-A**. The speed limit was 70 miles per hour and there were four lanes of travel at that location. **Exhibit 1-A**. Plaintiff was driving a 1998 GMC C1500 Sierra four wheel drive pick-up truck equipped with a trailer hitch. See Plaintiff's Deposition Transcript attached as **Exhibit 1-B**, pp. 54, 56.

Defendant Miller entered westbound I-96 at Farmington Road. After he slowly merged with flowing traffic in the right curb lane, he began to gradually and cautiously move to the outer lanes where traffic was flowing more smoothly. As he was changing lanes from the right center lane into the left center lane, Plaintiff, who was driving in the right center lane, slammed on her brakes to avoid a stalled vehicle in front of her. **Exhibit 1-B**, p. 61-63; See also Plaintiff's Statement attached as **Exhibit 1-E**. Unable to stop his vehicle in time, Miller rear-ended Plaintiff's truck at a speed of between 5 and 10 mph. See Defendant Kenneth Miller's Deposition Transcript attached as **Exhibit 1-G**, p. 26-29.

After Miller struck the Plaintiff's truck, he was also struck from the rear by the third vehicle operated by Co-Defendant, Juan Hernandez-Moreno³. **Exhibit 1-A**. The impact of Moreno's vehicle pushed Miller's vehicle forward, again striking Plaintiff's truck. **Exhibit 1-A**.

Plaintiff, Miller and Moreno were able to drive their vehicles to opposite sides of the expressway. Miller observed Plaintiff moving inside her vehicle and talking on her cell phone. **Exhibit 1-G**, pp. 36-37. Plaintiff testified she called 911 to report the accident and also called her roommate who later arrived at the scene. **Exhibit 1-B**, pp. 71, 74. Plaintiff was ambulatory at the scene. She exited her vehicle before the police arrived because she was concerned about the damage to the back end of her truck. **Exhibit 1-B**, p. 70. Plaintiff was able to drive her truck away from the scene. **Exhibit 1-A**. Plaintiff did not request medical assistance at the scene. **Exhibit 1-B**, 73-74.

2. Appellee's Immediate Post-Accident Symptoms.

The Michigan Traffic Crash Report is coded "1" to indicate there was little to no indication of damage to Plaintiff's vehicle. **Exhibit 1-A**.

Plaintiff first sought medical attention later that evening at approximately 7:00 p.m. when she went to the Garden City Hospital Emergency Room. **Exhibit 1-B**, pp. 73, 78. She was examined and x-rays were taken. The final diagnosis was **cervical strain with a reported history of cervical fusion with degenerative joint and disc disease**. See Garden City Hospital ER Report attached as **Exhibit 1-C**. When she reported to the emergency room, Plaintiff complained of pain in her neck radiating down to her right arm. **Exhibit 1-B**, pp. 78-79. She made no complaint of right shoulder pain. **Exhibit 1-C**. She denied hitting her head or experiencing any loss of consciousness. **Exhibit 1-C**. She denied any headache, extremity pain, abdominal pain, chest pain or any other related symptoms. **Exhibit 1-B**, p. 68. She was

³ Co-Defendant Juan Hernandez-Moreno is in default and not a party to this appeal.

ambulatory without difficulty. **Exhibit 1-C.** She never appeared to be in acute distress and at no time in the emergency room did her acute level of distress change or escalate. **Exhibit 1-C.** Importantly, she had full range of motion in her neck and only a subjective complaint of pain upon extreme cervical extension and flexion. **Exhibit 1-C.**

The physical examination of Plaintiff in the emergency room revealed negative Rhomberg and straight-leg raising tests. **Exhibit 1-C.** X-rays of her cervical spine showed a **previous fusion surgery at C4-C5 with degenerative changes from C4 through C7.** **Exhibit 1-C.** The x-rays were otherwise unremarkable. **Exhibit 1-C.** Upon her discharge, she was advised to rest and apply moist heat to the affected area. **Exhibit 1-C.** She was told to follow-up with her family physician in one or two days and return to the emergency room if her condition worsened. **Exhibit 1-C.**

Plaintiff presented with her family physician, Dr. Deborah Kay, on December 1, 2000. Dr. Kay diagnosed Plaintiff with cervical myositis and prescribed Darvocet, Flexeril and Celebrex. See Dr. Deborah Kay's records attached as **Exhibit 1-D.** Dr. Kay also referred Plaintiff to Theramatrix to begin physical therapy treatment. **Exhibit 1-D.** When Plaintiff returned to Dr. Kay on December 8, 2000, she indicated that she was a little more flexible after her physical therapy sessions and that she was experiencing fewer headaches. **Exhibit 1-D.** At her office visit on December 18, 2000, Dr. Kay advised Plaintiff she could return to work on December 19, 2000. **Exhibit 1-D.** In particular, Dr. Kay opined that she was "better [sic] can do most things now." **Exhibit 1-D.**

The physical therapy regimen that Dr. Kay prescribed required Plaintiff to undergo three treatments per week for four weeks. **Exhibit 1-D.** However, Plaintiff was discharged from Theramatrix on December 22, 2000 because she had only appeared for five out of nine scheduled

sessions up until that time. The discharge report from Theramatrix indicates that Plaintiff called the office on December 22, 2000 to discharge herself from therapy "**due to her busy schedule**" even though she was making steady progress and her prognosis was described as "good." See Theramatrix Physical Therapy Records attached as **Exhibit 1-F**.

At the time of the accident, Plaintiff was employed by GMAC as a **customer service specialist**. It was a sedentary position requiring her to sit in a chair all day, answer telephones and type on a computer. **Exhibit 1-B**, p. 45. Plaintiff testified that her job did not require heavy labor and there was no lifting associated with this job. **Exhibit 1-B**, p. 45-46. Plaintiff testified she missed approximately three weeks of work at GMAC and returned to her job on December 19, 2000. **Exhibit 1-B**, p. 89.

3. Appellee's Preexisting Injuries.

Plaintiff's preexisting injuries are highlighted in a "surgical timeline" which Plaintiff prepared for Dr. Kay and was included in Dr. Kay's medical chart. See Surgical Timeline attached as **Exhibit 1-H**.

Plaintiff is 5' 5" tall and weighs approximately 275 pounds, which has been her average adult weight. **Exhibit 1-B**, p. 86. As Plaintiff's surgical timeline indicates, the first cervical MRI of her spine/neck was performed on December 16, 1998, which was 2 years **before** the accident at issue. **Exhibit 1-H**. Plaintiff testified she had neck problems since she was about eight or nine years old. See Michigan Pain Management Consultants, P.C. History and Physical Form attached as **Exhibit 1-I**. She explained that her neck would "lock" in position, but she would be able to "crack her neck" to relieve the pain. **Exhibit 1-I**. As a child, her parents took her to family doctors and several chiropractors who did "adjustments" by cracking her neck, but the

pain would always return. **Exhibit 1-I.** Plaintiff's neck condition worsened as she got older. **Id.** She received physical therapy and neck traction while growing up. **Id.**

Plaintiff was also involved in several incidents **before** the motor vehicle accident involving additional trauma to her neck. In 1992, she was an unrestrained driver and rear-ended another vehicle at approximately 60 mph. She struck her head on the windshield and was thrown backward. She has complained of sharp and shooting neck pain since the 1992 motor vehicle accident. See **Exhibit 1-B**, p. 108-112; See also Garden City Hospital records attached as **Exhibit 1-J.**

On March 4, 1998, Plaintiff reported that she had arthritis in her neck, which she described as **hereditary, possibly associated with worsening scoliosis.**⁴ See Dr. Lawley's Medical Records attached as **Exhibit 1-K.** She indicated that this pain affected both her neck and **right shoulder.** **Exhibit 1-K.** She complained that her neck pain was worsening for about ten years and her right shoulder pain was worsening for one year. **Id.** The pain was severe at times which limited certain functions. **Id.**

On June 1, 1999, Plaintiff sustained injury when she fell in her bathroom, striking her head and neck against the wall of the bathtub and shower. See Dr. Jacob's Medical Records attached as **Exhibit 1-L.** Specifically, she reported that she "jammed her neck" and recalled having similar symptoms in 1988. **Id.** She was examined by Dr. Jeffrey Lawley who ordered an MRI of Plaintiff's cervical spine. This MRI showed that Plaintiff had a focal herniated intervertebral disc, most prominent at C4-5. See August 11, 1999 Cervical MRI attached as **Exhibit 1-M.** Dr. Lawley also suspected she had either a herniated intervertebral disc extending

⁴ Plaintiff's mother is confined to a wheelchair because of spinal stenosis in her lower back. (**Exhibit 1-B**, p. 12).

to the left at C5-6 or a disc bulge to the left at C5-6. **Exhibit 1-M.** The MRI report also noted a posterior disc bulging at C6-7. Degenerative disc disease changes were noted at C4-5, C5-6 and C6-7. **Id.** Based on the findings of this MRI, Plaintiff underwent a cervical discectomy with fusion at the C4-C5 vertebrae on October 8, 1999. **Exhibit 1-L.**

On December 26, 1999, approximately two and a half months after her first neck surgery, Plaintiff slipped on ice while getting out of her outdoor spa/jacuzzi at her home. **Exhibit 1-K.** She fell down two steps and landed on her back. **Exhibit 1-K.** When Plaintiff returned to Dr. Lawley for an examination, she complained that she had reinjured her neck and broke one toe. **Exhibit 1-K.** She also explained to Dr. Lawley that she believed that her disc at C5-C6 was "still hernia[ted]". **Exhibit 1-K.** Dr. Lawley sent a letter to Dr. Kay following her January 4, 2000 office visit. Dr. Lawley commented as follows:

"Deborah informed me that on December 26, 1999 she tripped and fell outside of her home which resulted in recurrence of her neck pain. She was concerned that she may have somehow done something detrimental to the surgery that was done by Dr. Jacobs. **She also indicated that Dr. Jacobs only addressed one of her two discs that were problematic.**" (**Exhibit 1-K**) (emphasis added).

Dr. Lawley advised Plaintiff to return to Dr. Jacobs who performed her first neck surgery. **Exhibit 1-K.** An MRI taken on January 31, 2000 revealed some pathology at both C5-6 and C6-7. See the January 31, 2000 Cervical MRI attached as **Exhibit 1-N.** Specifically, the MRI demonstrated degenerative disc change at C5-6 with posterior osteophytes making contact with the anterior margin of the cord eccentric to the left, which caused a mild straightening of the normal anterior convexity of the cord on the left. **Exhibit 1-N.** Dr. Jacobs had previously indicated, as early as September 22, 1999, that Plaintiff had chronic C5 radiculopathy with incipient cord compression and advanced diffuse degenerative spine and disc disease from C4 through C7. **Exhibit 1-L.** Plaintiff had a large central herniated disc at C4-5 and some lesser

pathology at C5-6 and C6-7. **Exhibit 1-L.** In other words, there was diagnostic evidence of pathology at all three levels although Dr. Jacobs only performed the first cervical discectomy with fusion at C4-5. This is consistent with Dr. Lawley's letter to Dr. Kay indicating that Dr. Jacobs had only addressed one of Plaintiff's two discs that were problematic. **Exhibit 1-K.** It should be reemphasized that the motor vehicle accident involved in this lawsuit did not occur until November 29, 2000.

4. Appellee's Alleged Injuries And How They Have Allegedly Impacted Her Life

Plaintiff is claiming injuries to her neck and right shoulder resulting from the motor vehicle accident. On November 21, 2001, Plaintiff had her second neck surgery, an anterior cervical discectomy at C5-C6 and C6-C7 with interbody fusion at these levels. There is no dispute Plaintiff has been told that she suffers from an arthritic condition in her neck which she has confirmed is a hereditary condition. **Exhibit 1-K.** The first cervical surgery Dr. Jacobs performed prior to the accident only addressed the most problematic condition Plaintiff was experiencing at that time; the radiculopathy at C4-5. **Exhibit 1-L.** She also had disc pathology at C5-6 and C6-7, but to a lesser extent. The MRI taken before the motor vehicle accident clearly shows that Plaintiff also had disc pathology at C5-6 and C6-7. **Exhibit 1-N.** The medical records clearly establish she had disc bulges and protrusions prior to the accident at issue. Additionally, Plaintiff's slip and fall incidents occurring in her bathtub and outdoor spa did not improve or strengthen the deteriorating condition of her cervical vertebrae. Plaintiff's morbid obesity and "no neck syndrome," as identified by Dr. Soo, were contributing factors for the need of a second neck surgery. See Dr. Soo's Medical Records attached as **Exhibit 1-O.**

Plaintiff underwent **right shoulder** surgery on February 21, 2002 for a torn rotator cuff. However, on January 12, 1999, almost two years **before** the accident, Dr. Lawley reviewed an

MRI scan of Plaintiff's right shoulder which confirmed a partial thickness rotator cuff tear. **Exhibit 1-K.** Additionally, Plaintiff signed a medical form on March 4, 1998, more than 2 1/2 years **before** the accident, indicating she had right shoulder pain when lifting objects that had been worsening for the previous year (dating back to 1997). **Exhibit 1-K.** In fact, Plaintiff reported to Dr. Lawley on this date that she had severe pain while lifting objects and that she could not sleep on her right shoulder. **Exhibit 1-K.** Clearly, Plaintiff had preexisting pathology regarding her right shoulder and complaints of pain and difficulty when lifting objects that had been worsening as early as 1997.

Plaintiff claims that she led a "very active" lifestyle before the accident and that she is unable to perform many of the activities she routinely performed before the accident. **Exhibit 1-B**, p. 168. In particular, Plaintiff testified that she can no longer collect, restore or sell large antiques. **Id.** at 168. She also claims that she can no longer draw, garden, hike, bowl, perform yard work, go boating, ride roller-coasters, exercise, and care for her nieces and nephews. **Id.**, pp. 168-188. Counsel for Appellants had an opportunity to cross-examine Plaintiff to explore and ascertain how these activities affected her general ability to lead a normal life under the Kreiner criteria.

As will be more fully explained below, counsel for Appellants discovered at her deposition that Plaintiff only participated in these activities sporadically during her life. Therefore, her alleged inability to perform them at the present time has not affected the trajectory or scope of her life. Moreover, Plaintiff is still able to perform most of these activities even if in a limited fashion. The reality is that even assuming Plaintiff's injuries have limited some of her activities, such limitations have not been of the extent or magnitude to have affected her general ability to lead her normal life.

B. MATERIAL PROCEEDINGS

1. **The Trial Court's Opinion.**

On April 19, 2005, Judge Gershwin A. Drain heard and considered the oral arguments presented by the parties. Judge Drain's decision was restricted to determining whether Plaintiff's injuries affected her general ability to lead a normal life sufficient to establish a serious impairment of a body function. The trial court provided the following reasoning in support of its decision to grant Appellants' Motion for Summary Disposition:

Now, this accident really seemed to be a relatively small incident in her life. At the accident she wasn't removed by ambulance. She I think essentially indicated she didn't have any serious injuries. She later went to the hospital. There was just a strain. There were x-rays taken, and that those present disk problems were disclosed at that point. And really the only thing that was shown at that time was the strain I believe.

And she then went to her family physician, had some treatment. It was relatively – The plan was I think three times a week for four weeks. And she started it and really didn't get very far and really was back to work in about three weeks.

And really, when you look at her life before the accident and after the accident, there is really isn't shown – there isn't really shown to be a prima facie case of meeting the Kreiner test. She did have that subsequent surgery, but that was really a year after the accident and she was back to work within three weeks.

And I think Mr. Moffatt has pretty accurately reflected the facts in terms of her going back to work, getting into this buyout and getting another job. And the things she said in her deposition that she couldn't do were very minimal, and she had the ability to do most of the things she did prior to the accident.

So really, Kreiner has set a pretty high bar and I don't believe that the plaintiff has established a prima facie case of meeting the threshold of Kreiner. So I am accordingly going to grant the defendant's motion for summary disposition. And that's the court's ruling. (**Exhibit 2**, pps. 18-19).

A copy of the transcript of the hearing on Appellants' Motion for Summary Disposition is attached as **Exhibit 2**.

On May 3, 2005, the trial court entered an order denying plaintiff's motion for reconsideration.

2. The Court of Appeals' Opinion

Appellee appealed the trial court's opinion and on January 26, 2006 the Court of Appeals issued its decision reversing the trial court's decision and remanding the case for further proceedings pertaining to the narrow issue of whether Appellee sustained a *temporary* serious impairment of an important body function. See Court of Appeals Opinion and Order attached as **Exhibit 3**.

Importantly, the Court of Appeals acknowledged that "Plaintiff's life before the accident is not substantially different from her life after the accident." Further, the Court of Appeals indicated that "Plaintiff failed to present evidence to establish that her general ability to lead her normal life has been affected, so the trial court correctly found that plaintiff is not presently suffering a serious impairment of an important bodily function." **Exhibit 3**.

Despite this pronouncement, the Court of Appeals reasoned that the trial court failed to address and consider whether Appellee sustained a temporary serious impairment of an important bodily function and reversed the trial court's decision remanding the case for further proceedings. Specifically, the Court of Appeals tacitly determined that the trial court failed to appreciate that Appellee underwent discectomy to her neck and acromioplasty surgery to her right shoulder a year following the accident when rendering its decision.

As will be fully discussed below, the Court of Appeals erroneously concluded that the trial court has an additional duty to determine whether Appellee sustained a temporary serious impairment of an important body function after it already agreed that Appellee did not sustain a serious impairment of an important body function. MCL 500.3135 and *Kreiner* do not require

that a trial court undertake a separate factual and legal inquiry as to whether a plaintiff has sustained a temporary impairment. Rather, the directive from *Kreiner* is that a trial court must determine, after considering the totality of the circumstances, whether the plaintiff's general ability to lead a normal life has been affected. The trial court conducted such an analysis. Moreover, the analysis necessarily encompassed a consideration of temporal factors such as the duration and severity of the impairment, which the Court of Appeals failed to recognize.

ARGUMENT

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY CREATING AND IMPOSING A SEPARATE AND INDEPENDENT DUTY UPON THE TRIAL COURT TO DECIDE IF APPELLEE SUSTAINED A TEMPORARY SERIOUS IMPAIRMENT OF BODY FUNCTION EVEN THOUGH THE TRIAL COURT REACHED ITS DECISION AFTER CONSIDERING THE “TOTALITY OF THE CIRCUMSTANCES”, WHICH INCLUDES TEMPORAL FACTORS ARTICULATED IN *KREINER*.

A. STANDARD OF REVIEW

A trial court’s decision on a motion for summary disposition is reviewed de novo. *Dresel v Ameribank*, 468 Mich 557, 561 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278 (2004). When reviewing a motion for summary disposition, this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 96-97 (2001). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leave open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183 (2003).

B. ARGUMENT

1. *The Kreiner Criteria*

Appellee has alleged she sustained injuries from the motor vehicle accident which meet the no-fault threshold. The No-Fault Act allows for tort recovery in three instances. The Act provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, **serious impairment of body function**, or permanent serious disfigurement. (Emphasis added).

Further, the Act defines “serious impairment of body function” as follows:

As used in this section, “serious impairment of body function” means an **objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life**. (Emphasis added).

MCL §500.3135(7).

The “serious impairment of body function” threshold is intended to eliminate suits based on minor injuries. *DiFranco v Pickard*, 427 Mich 32, 60 (1986).

In *Kreiner v Fischer*, 470 Mich 109 (2004), this Court provided the following analysis to address whether the statutory threshold of “serious impairment of body function” had been satisfied:

First, a court must determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination of whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff’s injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i) and (ii).

Second, if a court can decide the issue as a matter of law, it must next determine if an “important body function” of the plaintiff has been impaired. It is insufficient if the impairment is on an unimportant body function. Correspondingly, it is also insufficient if an important body function has in fact been injured, but not

impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient.

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

Kreiner, supra at 131-134 (footnotes omitted).

In other words, *Kreiner* held that "[d]etermining whether a plaintiff is 'generally able' to lead his or her normal life requires considering whether the plaintiff is '**for the most part**' **able to lead his normal life**" and that "[t]o 'lead' one's normal life contemplates more than a minor interruption in life." *Id.* at 130-131. In addition, the impairment "must affect the *course* of a person's life" and "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected." *Id.* at 131. (Emphasis in original).

This Court also declared that in determining whether an impairment affects a person's general ability to lead his or her normal life, the starting point "should be identifying how his or her life was affected, by how much, and for how long." *Id.* at 131. It is noted that "[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person's overall life"; and that to determine the affect, a court should "compare the plaintiff's life before and after the accident", and consider "the significance of any affected

aspects on the course of plaintiff's overall life." *Id.* at 131-132. A trial court must "engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyles has actually affected the plaintiff's 'general ability' to conduct the course of his life" and that merely any affect on a plaintiff's life is insufficient. *Id.* at 133.

In evaluating a plaintiff's general ability to conduct the course of his or her normal life, the following objective factors may be considered: (a) the nature and extent of the impairment; (b) the type and length of treatment required; (c) the duration of the impairment; (d) the extent of any residual impairment and (e) the prognosis for eventual recovery. *Id.* at 133-134.

2. *Although The Court Of Appeals Agreed With The Trial Court That Appellee Did Not Sustain A Permanent Serious Impairment, The Court Of Appeals Erroneously Determined That The Trial Court Failed To Ascertain Whether Appellee Sustained A Temporary Serious Impairment.*

The Court of Appeals' decision was aligned with the trial court's decision in that both courts determined that Appellee's life before the accident was not substantially different from her life after the accident. See Court of Appeals Op. at p. 2, **Exhibit 3**. Specifically, the Court of Appeals provided the following analysis:

Plaintiff has suffered back and neck problems since childhood. She had surgery on her neck two times before the present accident occurred. After that surgery, her condition improved, but she continued to experience pain in her back, neck and shoulder. Plaintiff was off work from the present accident for approximately three weeks before returning full-time. She accepted a buy-out from her employer, then worked full-time for another company for more than a year. Plaintiff claims that her general ability to lead a normal life has been affected because she is unable to work. However, in the substantial amount of medical history that was provided to the court, it does not appear that her doctor ever restricted her activity or employment, except for the three weeks that she was off work after the accident. When the extent of the impairment is considered, "[s]elf imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [that] point."

Exhibit 3 at p. 2. (citations omitted).

Moreover, the Court of Appeals explicitly indicated that “Plaintiff’s life before the accident is not substantially different from her life after the accident.” **Exhibit 3** at p. 2.

Although the Court of Appeals’ decision appeared to be in lockstep with the trial court, it erroneously deviated from the directives in *Kreiner* by determining that the trial court failed to appreciate and consider whether Appellee sustained a temporary serious impairment because of the neck and right shoulder surgeries following the accident. Specifically, the Court of Appeals departed from the trial court’s decision when it held that “[G]iven the significant nature of the surgeries involved in treating plaintiff’s injury, we feel that summary disposition cannot be granted until the possibility of a temporary serious impairment of an important bodily function has been considered by the trial court.” **Exhibit 3**. The Court of Appeals also noted that neither party directed the trial court’s attention to the issue of whether Appellee sustained a temporary serious impairment. **Exhibit 3**.

3. ***Kreiner Does Not Impose Upon The Trial Court A Separate And Independent Duty To Determine If Appellee Sustained A Temporary Impairment Of Body Function***

The Court of Appeals is correct that the parties did not specifically devote particular attention to whether Appellee sustained a *temporary* serious impairment, but the law does not impose such a requirement. The criteria set forth in MCL 500.3135 do not mention or include the terms “temporary serious impairment”. The standard is a “serious impairment of body function”. The *Kreiner* decision, interpreting MCL 500.3135, stands for the proposition that in order to satisfy the burden of proving a serious impairment of body function, it must be determined whether the person’s general ability to lead a normal life has been affected. This Court in *Kreiner* established specific guidelines and criteria for a trial court to consider when determining if a person’s general ability to lead a normal life has been affected. As articulated

above, many of the factors extracted from *Kreiner* have temporal or time-dependent qualities. For example, *Kreiner* mentions that a trial court should consider the type and length of treatment required, the duration of the impairment, the extent of any residual impairment and the prognosis for eventual recovery. *Kreiner, supra* at 133, n 17.

In this case, the trial court did consider these criteria before making its decision. Both parties vigorously argued their respective sides as to how, and to what extent, the motor vehicle accident affected Appellee's general ability to lead her normal life. The trial court was cognizant of the fact that Appellee underwent two surgeries more than a year following the accident because Appellee's counsel briefed and argued these points at oral argument. In fact, Appellee counsel's opening comments during the oral argument at the motion for summary disposition hearing highlighted Appellee's surgeries:

. . . I have heard nothing that says that my client's injuries, which we allege are two herniated disks requiring surgery, one surgery taking place in November of 2001, approximately 11 months after the accident, and as a result of that surgery being successful her starting to feel pain in her right arm and the limitation of motion, which required a rotator cuff surgery in January of – excuse me, February 2002. In each one these surgeries she required recuperation time, was off work, wasn't able to engage in those normal activities which a person would normally engage in.

Exhibit 2.

The Court of Appeals' assertion that the parties never raised, or the trial court never considered, the affect of Appellee's surgeries on her general ability to lead a normal life is misplaced. The trial court took into account everything that happened to Appellee following the accident, including her surgeries. After reviewing both positions, the trial court concluded, under the totality of the circumstances, that Appellee's general ability to lead her normal life was not affected by the accident.

Regardless, the Court Appeals determined that the trial court should have separately considered if Appellee sustained a *temporary* serious impairment of body function. Although the Court of Appeals correctly recited the legal proposition that “a serious impairment of a body function can be found even where ‘the duration of the impairment is short’”; its decision is flawed because it omits the axiom that any decision must be based on the “totality of the circumstances”, which the trial court did properly consider when issuing its ruling:

. . . that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the *totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life."*

Kreiner, supra at 134 (citations omitted)(emphasis added).

The Court of Appeals’ decision unnecessarily requires that the trial court dedicate separate, exclusive and independent consideration to the issue of whether Appellee sustained a *temporary* serious impairment of body function. The *Kreiner* decision does not compel a trial court to undertake such a task. Instead, the *Kreiner* decision instructs a trial court to analyze a number of different factors when determining whether there has been an effect on a person’s general ability to lead her normal life, most of which are time-sensitive.

As evidenced by the trial court’s opinion, temporal factors such as the duration of Appellee’s impairment were considered under the “totality of the circumstances” standard imposed by *Kreiner*. It appears the Court of Appeals lost sight of the totality of the circumstances standard by requiring a separate and independent inquiry of whether Appellee sustained a temporary serious impairment of an important body function. The Court of Appeals committed reversible error by imposing upon the trial court a separate and independent duty to

decide if Appellee sustained a temporary serious impairment of body function despite the fact the trial court reached its decision after considering the “totality of the circumstances”, which necessarily entails temporal factors such as the duration of Appellee’s impairment.

4. *If The Court Of Appeals’ Decision Remains Undisturbed, It Could Lead To An Erosion Of Kreiner*

After considering the same evidence presented before the trial court, the Court of Appeals determined that Appellee failed to present evidence to establish that her general ability to lead her normal life has been affected. Yet, the Court of Appeals reversed the trial court’s decision because of the possibility that during the short time following her two surgeries, she may have sustained a temporary serious impairment of body function. Essentially, the Court of Appeals isolated a short period of time in Appellee’s life to ascertain whether her general ability to lead a normal life was affected. This analysis abridges the seminal rule from *Kreiner* that “the impairment must affect the *course* of a person’s life” and “[a]lthough some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s ‘general ability’ to lead his normal life has not been affected.” *Id.* at 131.

If the logic of the Court of Appeals is followed, it is conceivable that a trial court would need to review a plaintiff’s life, after an accident, on a weekly, or monthly basis, to determine whether, during these short time spans, a plaintiff’s general ability to lead a normal life has been affected by the accident. In other words, a trial court could determine that a plaintiff’s general ability to lead a normal life was affected for a two week period of time following a surgery precipitated by a motor vehicle accident. Even if the plaintiff’s condition resolved after two weeks of recuperation, and the course or trajectory of plaintiff’s normal life has not been

affected, the Court of Appeals' opinion seems to invite trial courts to find temporary periods of impairment and deny motions for summary disposition on this basis.

Appellants submit that this Court did not interpret the Michigan Legislature's intent to include a week-to-week, or month-to-month snapshot of a plaintiff's life when deciding whether a plaintiff's general ability to lead a normal life was affected by a motor vehicle accident. Rather, the *Kreiner* decision instructs a trial court to look at the "course of the person's life" or the "trajectory of the plaintiff's normal life". It is a broad and expansive inquiry necessitating an overview of a person's entire life, as opposed to short and isolated periods of time, recognizing that conditions which appear to be serious in the short term actually have minor impact on a person's entire normal life when the totality of the circumstances is considered. The criteria set forth in *Kreiner* is a testament to the methodology and extensive analytical framework that litigants and trial courts must utilize when deciding if a plaintiff's general ability to lead a normal life is affected.

Here, Appellee is a woman who has suffered neck problems for most of her life. She underwent multiple surgeries on her neck prior to the accident and has been diagnosed with degenerative disc disease. In addition, her right shoulder pain preexisted the November 29, 2000 accident. Following the accident, she missed three weeks of work and returned to full-time employment. Her primary care physician lifted her medical restrictions and Appellee was advised to return to work. During the three weeks she was off of work, she participated in physical therapy. She cancelled her therapy because of her busy schedule. She continued to work and entered into a buyout with her former employee.

Following an anterior cervical discectomy in November of 2001 and a right shoulder surgery, Appellee hired in at Miserendino and Company in October of 2002. She worked as a

payroll manager until she was terminated in August of 2004. The trial court considered all of these facts and determined that, overall, the course or trajectory of Appellee's life was not affected by the accident in light of the fact that her pre-accident life revealed a long and extensive history of cervical and shoulder symptoms. The trial court did not focus its attention on a small facet of Appellee's post-accident life to determine if, during that period of time, she sustained a temporary serious impairment of body function. Rather, it properly considered the totality of the circumstances as required in *Kreiner*.

In conclusion, it was unnecessary for Appellee or Appellants to separately raise the issue of whether Appellee sustained a temporary serious impairment of body function because it was already addressed, briefed, and argued as a component to the issue of whether Appellee sustained a serious impairment of body function. Accordingly, Appellants request this Court to grant their Application for Leave to Appeal, or in the alternative, to reverse the decision of the Court of Appeals and reinstate the trial court's opinion and order granting Appellants' motion for summary disposition.

RELIEF REQUESTED

WHEREFORE, Defendants-Appellants, KENNETH MILLER, AUTOMOTIVE RENTALS, INC., HIGH VOLTAGE MAINTENANCE CORPORATION and EMERSON ELECTRIC CO., respectfully request that this Court grant their Application for Leave to Appeal, or in the alternative, to reverse the decision of the Court of Appeals and reinstate the trial court's opinion and order granting Defendants-Appellants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Respectfully submitted,

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